In The

Supreme Court of the United States

October Term, 1976

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

Petition for Writ of Certiorari Filed October 27, 1976,
Certiorari Granted April 4, 1977

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BRIEF OF PETITIONERS

OPINION BELOW

The Opinion of the Court of Appeals for the District of Columbia Circuit is reported at 540 F.2d 1114 (D.C. Cir. 1976), and at 9 ERC 1149. The Opinion also has been reprinted in the Joint Appendix to this case at A. 39a-90a.*

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1976. A petition for a writ of certiorari to the

* Unless otherwise indicated, references to the Appendix (A. .....a) are to the Joint Appendix filed with this Court in the consolidated cases numbered 76-529, 76-585, 76-594, 76-603, 76-619 and 76-620.

Court of Appeals for the District of Columbia Circuit was filed on October 27, 1976, and was granted on April 4, 1977.*

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

In granting the petition for a writ of certiorari, this Court limited review to the following questions:

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act.

2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to Federal Land Managers and Indian governing bodies power to reclassify federal and Indian lands within their jurisdiction.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Air Act Amendments of 1970, 84 Stat. 1676, 42 U.S.C. §§ 1857, et seq., are contained in the Addendum attached to this brief. The regulations are set forth in the Joint Appendix at A. 206a.

STATEMENT OF THE CASE

1. The Procedural Setting of the Case

This case brings anew to this Court the question of the statutory authority for the so-called "significant deterioration" regulations promulgated by the Respondent, the En-

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* In granting the petition, this Court consolidated the case with five other cases numbered 76-529 (Montana Power Co. v. EPA), 76-594 (Indiana-Kentucky Elec. Corp. v. EPA), 76-603 (Alabama Power Co. v. EPA), 76-619 (Utah Power & Light Co. v. EPA), and 76-620 (Western Energy Supply and Transmission Associates v. EPA).

vironmental Protection Agency (EPA), on November 27, 1974, 39 Fed. Reg. 42509, et seq. (Dec. 5, 1974) (A. 206a-241a).

The regulations were issued in response to an order of the United States District Court for the District of Columbia entered on May 30, 1972, in the case of *Sierra Club* v. *Ruckelshaus*, 344 F.Supp. 253 (D.D.C. 1972). Prior to that case, the Administrator of EPA had announced that pursuant to the mandatory language of Section 110(a)(2) of the Clean Air Act, 42 U.S.C. § 1857c-5(a)(2), any state plan for the implementation of national air quality standards under the Act would be approved if the plan satisfied the eight criteria specified for such plans under that section. In response to a suit by the Sierra Club and other environmental organizations, however, the District Court ordered the Administrator (i) to disapprove all state implementation plans if the plans did not contain, in addition to the eight criteria specified for such plans in Section 110, further provisions that would prevent degradation of existing air quality in areas where air quality is better than that required by the national primary and secondary standards, and (ii) to promulgate regulatory revisions for the state plans to prevent such degradation.

A panel of the Court of Appeals for the District of Columbia Circuit affirmed the District Court order *per curiam*, *Sierra Club* v. *Ruckelshaus*, D.C. Cir. No. 72-1528 (Nov. 1, 1972), and because of an equally divided vote by this Court, *sub nom. Fri* v. *Sierra Club*, 412 U.S. 541 (1973), the District Court decision was allowed to stand.

Thereafter, the Administrator disapproved all state implementation plans, concluding that none of the plans contained significant deterioration provisions sufficient under the District Court's order, 37 Fed. Reg. 23836 (Nov. 9, 1972), and began an informal rulemaking proceeding to develop regula-

tory revisions to the state plans that would protect against significant deterioration in the so-called "clean air" areas.[1] Final regulations on the subject were promulgated on November 27, 1974, 39 Fed. Reg. 42509 (Dec. 5, 1974).[2]

The Petitioners herein and others sought judicial review of the regulations pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 1857h-5(b)(1), and all petitions were consolidated in the Court of Appeals for the District of Columbia Circuit for review. A panel of that court rendered its decision on August 2, 1976, affirming the regulations as issued.

On October 27, 1976, the Petitioners herein filed a petition with this Court for a writ of certiorari to the Court of Appeals below, and the petition was granted April 4, 1977.

2. The Content of the Regulations

The regulations prescribe three classifications for areas with air quality better than the national standards. As explained in the preamble to the regulations, Class I is intended to apply to areas in which "practically any change in air quality would be considered significant"; Class II to areas where changes "normally accompanying moderate well-controlled growth" would be considered insignificant; and Class III to areas where "deterioration up to the national standards would be considered insignificant." 39 Fed. Reg. 42510.

For Classes I and II, specific increment ceilings are

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[1] As used in this brief, the term "clean air" areas refers to areas of the Nation where the air quality is better than that required by the primary and secondary standards established under Section 109 of the Clean Air Act, 42 U.S.C. § 1857c-4.

[2] Clarifying amendments were adopted January 16, 1975 (40 Fed. Reg. 2802), June 12, 1975 (40 Fed. Reg. 25004), and September 10, 1975 (40 Fed. Reg. 42011).

prescribed for increases in sulfur dioxide and suspended particulates, to be measured from January 1, 1975. For areas designated Class III, increases in particulates and sulfur dioxide are permitted up to the national standards.[3]

Initially, all areas of the Nation with air quality better than the national standards are designated by the regulations as Class II. 40 C.F.R. § 52.21(c)(3). The regulations authorize the states to request the Administrator to redesignate an area to another class, based upon the area's anticipated growth and a hearing record which, among other things, shows that the state considered "the *social, environmental,* and *economic effects* of such redesignation . . . upon other *areas* and *States,* and . . . *any impacts* . . . upon *regional* or *national interests.*" 40 C.F.R. § 52.21(c)(3)(ii)(d) (emphasis added). In addition to this exhaustive review, a redesignation will not be approved unless the state requests a delegation from EPA of the responsibility for carrying out the detailed new source review requirements of the regulations discussed below. 40 C.F.R. § 52.21(c)(3)(vi)(a).

Where federal lands are involved, such as national parks, national monuments, national wilderness and primitive areas and national forests, the Federal Land Manager responsible for the area may apply for redesignation, but only

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[3] The specific increment limitations are as follows:

Pollutant	*Class I* ug/m^3	*Class II* ug/m^3	*Class III* ug/m^3
Particulate Matter:			
Annual geometric mean	5	10	75
24-hour maximum	10	30	150
Sulfur Dioxide:			
Annual arithmetic mean	2	15	80
24-hour maximum	5	100	365
3-hour maximum	25	700	1300

to a more restrictive classification.[4] 40 C.F.R. § 52.21(c)(3)(iv). Similarly, the governing body of an independent Indian reservation may request redesignation of lands subject to its jurisdiction to any of the classes. 40 C.F.R. § 52.21(c)(3)(v).

Preconstruction review is required for nineteen specified types of stationary sources of sulfur oxides or particulate matter,[5] and requires a determination by the Administrator or his delegate (the states), based upon "diffusion modeling,"[6] that emissions from that new source, together with emissions from all other sources (commercial, residential, industrial), will not violate the significant deterioration increments applicable to that area, or "any other area."[7] 40

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[4] With respect to federal lands within its boundaries, a state may apply for redesignation to any class, provided the Federal Land Manager has been consulted and the redesignation will be consistent with adjacent land. 40 C.F.R. § 52.21(c)(3)(iii).

[5] (1) Fossil-fuel steam electric plants; (2) coal cleaning plants; (3) kraft pulp mills; (4) portland cement plants; (5) primary zinc smelters; (6) iron and steel mills; (7) primary aluminum ore reduction plants; (8) primary copper smelters; (9) municipal incinerators; (10) sulfuric acid plants; (11) petroleum refineries; (12) lime plants; (13) phosphate rock processing plants; (14) by-product coke oven batteries; (15) sulfur recovery plants; (16) carbon black plants; (17) primary lead smelters; (18) fuel conversion plants; (19) ferroalloy production facilities. 40 C.F.R. § 52.21(d).

[6] Under such an approach a computer would predict the increment increases in sulfur dioxide and particulates that would result from the new or modified plant and other sources having a change in impact on the area since the year 1974. With such modeling, precise measurements of air quality are not required either for the baseline period or for subsequent periods, as the prediction of results based on selected assumptions is deemed sufficient. 39 Fed. Reg. 31003 (Aug. 27, 1974) (A. 175a-176a).

[7] By referring to the effects of increments upon "any other area," the regulations thus impose a "shadow effects" rule that extends a zone's increment ceilings far beyond the boundaries of the zone itself. For most areas of the Nation, for example, EPA has suggested that a Class I inhibition could stretch *60 to 100 miles* into a neighboring Class II or III area. 39 Fed. Reg. 42513 (Dec. 5, 1974) (A. 219a-220a).

C.F.R. § 52.21(d)(2)(i). In addition, any such source is required to meet an emission limit, to be specified by the Administrator, which would result from application of the "best available control technology" for sulfur dioxide and particulate matter. 40 C.F.R. § 52.21(d)(2)(ii).

3. The Impact of the Regulations

The significant deterioration regulations will impact drastically on the future development of this country's energy resources, aggravate the already overcrowded and polluted conditions of our urban centers and deprive our rural and depressed regions of opportunities for economic growth. These land use regulations—in effect, federally mandated zoning classifications—set in motion an unrestrained sweep of asserted authority over this Nation's future economic and social life.[8] Their authority is based solely upon *two* words in a *purpose clause* of a single act. Upon these two words, EPA has constructed a pervasive regulatory scheme which, by its own estimate, would apply to approximately 80 percent of this country's land area.[9]

EPA acknowledged the harsh potentials of its regulations by advising in its initial proposal of the regulations:

> "A national policy of preventing significant deterioration, however defined and implemented, will have a substantial impact on the nature, extent, and location of

[8] It takes little imagination to realize that if these three zoning classifications are sustained, in time an entire federal zoning code could evolve with multiple categories of permissible industrial, commercial and residential development. EPA recognized this potential when it changed its terminology from "zoning" to "classification" so as, in EPA's words, "to avoid confusion with conventional zoning concepts," stating that whereas conventional zoning only deals with a portion of a county, its regulations may affect several counties. 39 Fed. Reg. 31004 (Aug. 27, 1974) (A. 179a-180a).

[9] Transcript, p. 24, EPA Press Conf. Nov. 27, 1974.

> future industrial, commercial, and residential development throughout the United States. *It could affect the utilization of the Nation's mineral resources, the availability of employment and housing in many areas, and the costs of producing and transporting electricity and manufactured goods.*" 38 Fed. Reg. 18986 (July 16, 1973) (emphasis added) (A. 94a).

Other governmental agencies, in commenting on the regulations, agreed. The Department of Health, Welfare and Institutions, for example, objected that the regulations would actually *perpetrate the health and pollution problems* of our already overcrowded population centers, saying:

> "Insofar as non-deterioration freezes development patterns, it would perpetuate the incidence of air pollution in urban areas. The clear sky in a rural region might be saved only at the cost of what could eventually have been a clear sky in or near an urban region, a sky viewed by many times more people."[10]

The Secretary of Housing and Urban Development, as well, emphasized the *severe urban housing problems* that would be caused by significant deterioration regulations, as follows:

> "In our view, the adoption of any of the plans would result in the virtual cessation of community development activities which would be expected to provide for the future increase in population. Since there is a finite capacity within the urban areas to take this additional population increases, especially in view of the limitation imposed on urban areas by the national secondary ambient air quality standards, *the proposed rule would*

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[10] HEW, "Prevention of Significant Air Quality Deterioration, Social Welfare and Health Implications," Oct. 1973, pp. 6-7 (reproduced in the Joint Appendix in the case below at 565-66).

result in an intolerable situation—more people, but no place for them to reside."[11] (Emphasis added.)

The Department of Interior stressed its concern that the regulations would *restrict fuel and mineral development activities,* urging that "the benefits of nondeterioration would be more than offset by its costs."[12]

The potentially restrictive effects of the regulations on energy resource development have been documented in a report by Professor John Anderson of Kent State University, entitled "A Summary of Reserve and Resource Data on Coal, Uranium, and Oil Shale in the States of Michigan, Ohio, Kentucky, Tennessee, West Virginia, North Dakota, South Dakota, Montana, Wyoming, Colorado and Utah." That report, hereafter referred to as the Anderson Report, was submitted to the Court of Appeals below as a Supplemental Addendum to the brief of the Petitioners herein.

The Anderson Report reveals that, assuming that certain aesthetic and recreational areas such as national parks, monuments, and wilderness and primitive areas (and possibly national forests) would be reclassified under Class I,[13]

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[11] Letter to EPA from James T. Lynn, HUD, Nov. 13, 1973, p. 1 (Rec. Doc. E-18, EPA Certified Record of Rulemaking).

[12] Dept. of Interior, "Effect of Proposed Nondeterioration Regulations on Fuels and Minerals, Mining and Processing," p. 3 (reproduced in the Joint Appendix of the case below at 1096).

[13] The preamble to t e regulations states: "[T]here are some areas, such as national parks, where any deterioration would probably be viewed as significant." 39 Fed. Reg. 42510 (A. 210a). EPA has also explained, "Zone I would normally be applied to those ultra-clean areas such as national and state forests and parks." 38 Fed. Reg. 18993 (A. 124a). Further, the regulations authorize Federal Land Managers to propose reclassification of the areas subject to their jurisdiction only to a more restrictive classification. 40 C.F.R. § 52.21(c)(3)(iv).

development within neighboring Class II and Class III areas would be severely restricted.[14]

The authors of the report selected eleven states in which the major portions of the Nation's resources of coal, oil shale, and uranium are found. For each of these states, the best available public data on resource availability were collected and located on maps. The authors then located on each state's map the boundaries of areas likely to be designated as Class I, such as national parks, monuments and forests, and national wilderness and primitive areas. Then by means of colored shadings on the maps, the authors depicted the inhibition or "shadow" zones caused by the Class I areas, using a 50 mile radius from the perimeter of each Class I area as a conservative measure of the inhibition shadow.[15]

The findings of the report are startling, and are best illustrated by the two regional maps that have been reproduced in the Addendum attached to this brief at Add. 21 and Add. 23. The report demonstrates that in the State of Kentucky, for example, which contains 9.5% of the total U.S. resources of bituminous coal, new processing of more than 25 billion tons of coal (approximately 98% of the

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[14] The preamble to the regulations explains (39 Fed. Reg. 42512): "Calculations have shown that because of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. . . . Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. . . . Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment." (A. 218a-219a).

[15] EPA has suggested that for most areas of the Nation, a Class I inhibition could stretch *60 to 100 miles* into a neighboring Class II or III area. 39 Fed. Reg. 42513 (Dec. 5, 1974) (A. 219a-220a).

total coal reserve area in the State) could be prohibited by the significant deterioration regulations. Anderson Report pp. 19, 22. West Virginia, which holds approximately 14.7% of all U.S. bituminous coal, could suffer an inhibition affecting more than 34 billion tons or 86% of the State's coal area. *Id.* at 29, 30.

In the West, with its extensive deposits of oil shale and uranium in addition to coal, the inhibitive effects of the regulations would be even more severe. As illustrated by the map reproduced at Add. 23, the mineral fuels resources of the states of Montana, Wyoming, Colorado, and Utah would be virtually blanketed by the shadow zones cast from the pristine Class I areas. The inhibition zones would affect nearly 64 billion tons of coal in Montana and 34 billion tons in Wyoming, Anderson Report, pp. 41, 44, 45 and 48; over 5 billion tons of uranium ore in Wyoming, Colorado and Utah, *id.* at 45, 50, and 55; and 100% of the extractable shale oil deposits in Colorado and Utah (representing a potential of more than 390 billion barrels), *id.* at 50, 55.

In short, the adverse effects from implementation of EPA's significant deterioration regulations could be enormous. It is equally disturbing to realize that growth and development determinations will be reached under these regulations, not on the basis of what the actual effect on air quality will be, but what a computer model says the effect will be.[16] Hence, if these regulations are sustained, hypothetical constructs, known to have an uncertainty

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[16] This was explicitly stated by EPA in its technical document supporting the regulations. The agency said that actual air quality data was unnecessary after a plant had been approved for construction as the assessment of air quality would "be accomplished through an accounting procedure whereby atmospheric modeling of individual sources will be used to keep track of the available or ('unused') increment. . . ." Rec. 9, Technical Support Doc. (Jan. 1975) at 29-30 (reproduced in the Joint Appendix of the case below at 125-26).

factor of five or more,[17] not actual data, will dictate critical land use decisions for generations to come. Against this background stands the central question whether these regulations are, nevertheless, required by the Clean Air Act.

SUMMARY OF ARGUMENT

A.1. EPA's regulations for the prevention of significant deterioration are not authorized under the Clean Air Act of 1970. The operative sections of that Act provide for the attainment and maintenance of national primary and secondary standards of air quality, which are designed to protect the public health with an "adequate margin of safety" and to promote every conceivable aspect of the public welfare. Clean Air Act §§ 103, 108, 109, 110, 302(h). The Act also provides for the control of new sources of industrial pollution through new source performance standards issued under Section 111. Nothing in the operative sections of the Act, either by express statement or by implication, suggests a requirement for more stringent standards beyond the primary, secondary and new source performance standards.

2. Section 110 of the Act *requires* the Administrator of EPA to approve any state plan for air quality control that meets eight criteria specified for such plans under that section. Those criteria are addressed exclusively to the attainment and maintenance of the national primary and secondary standards and contain no requirement that state plans also impose more stringent standards, such as EPA's no significant deterioration increment limits, in areas that

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[17] "An Examination of the Accuracy and Adequacy of Air Quality Models and Monitoring Data for Use in Assessing the Impact of EPA Significant Deterioration Regulations on Energy Development," p. VI-88 (Aug. 8, 1975). This report is contained in the Supplemental Addendum submitted to the court below.

already satisfy the primary and secondary standards. The provisions of Section 110 are mandatory in this regard, and do not permit the Administrator to consider factors other than the eight criteria specified. *Train* v. *NRDC,* 421 U.S. 60 (1975); *Hancock* v. *Train,* 426 U.S. 167 (1976); *Union Elec. Co.* v. *EPA,* 427 U.S. 246 (1976).

3. Congress has provided the states with permissive authority to adopt air quality standards more stringent than the national primary and secondary standards, but it has not required them to do so. Clean Air Act § 116. By forcing no significant deterioration standards upon the states, EPA's regulations render Section 116 illusory.

4. The court below has based the no significant deterioration regulations upon the "protect and enhance" recital found in the "findings and purposes" clause of the Clean Air Act, § 101(b)(1). As a preamble to the Act, such a phrase cannot serve as the statutory basis for a regulatory scheme as pervasive as the no significant deterioration regulations. *Train* v. *City of New York,* 420 U.S. 35 (1975); *Connecticut Light & Power Co.* v. *FPC,* 324 U.S. 515 (1945); *Coosaw Mining Co.* v. *South Carolina,* 144 U.S. 550 (1892); *Yazoo & Mississippi Valley R. R.* v. *Thomas,* 132 U.S. 174 (1889). This is particularly so where the construction of the "findings and purpose" clause conflicts with operative sections of the Act—in this case, Sections 110 and 116.

B. The legislative history of the Clean Air Act confirms that Congress' intention was limited to the attainment and maintenance of national primary and secondary air quality standards and that more stringent tertiary standards were not contemplated as mandatory requirements for state implementation plans.

C. The Clean Air Act provides no guidance to EPA in the development of regulations on the concept of no significant deterioration. The absence of statutory standards on the subject further proves that Congress did not intend a nondegradation policy. *City of Eastlake* v. *Forest City Enterprises,* 426 U.S. 668 (1976); *National Cable Television Ass'n.* v. *United States,* 415 U.S. 336 (1974); *Yakus* v. *United States,* 321 U.S. 414 (1944); *United States* v. *Rock Royal Co-op.,* 307 U.S. 533 (1939); *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935).

ARGUMENT

I. The Significant Deterioration Regulations Issued By EPA Are Not Authorized By The Clean Air Act Of 1970.

A. The Clear Language Of The Statute Precludes Any Requirement Of A No Significant Deterioration Standard More Stringent Than The National Primary And Secondary Standards.

The significant deterioration regulations have no express statutory basis in the Clean Air Act of 1970. The Court of Appeals conceded as much, freely admitting that the "prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act." *Sierra Club* v. *EPA,* 540 F.2d 1114, 1120-21 (D.C. Cir. 1976) (A. 46a-47a).

As a substitute for specific authorization, the Court of Appeals has grounded its decision in a broad statement of the general purpose of the Act found in Section 101(b)(1), to-wit:

> "The purposes of this title are—
>
> (1) to protect and enhance the quality of the Nation's air resources so as to promote the public health

and welfare and the productive capacity of its population." 42 U.S.C. § 1857(b)(1).

Emphasizing solely the words "protect and enhance" to the total exclusion of the remainder of the clause, the Court of Appeals concluded that the Clean Air Act embodies "a pre-existing policy of nondeterioration of air cleaner than the national standards," which can be implemented through the regulations here in question. 540 F.2d at 1124 (A. 55a).

In the following analysis, the Petitioners will show that the operative sections of the Clean Air Act prescribe the limits of EPA's rule-making authority, that such limits preclude authority for no significant deterioration regulations, and that the purpose clause of the Act, even with the expansive interpretation accorded it by the Court of Appeals, cannot be employed to subvert those limits.

1. *The Clean Air Act Of 1970 Prescribes By Clear And Precise Language A Rational, Systematic Plan For The Control Of Air Pollution That Does Not Include Authority For Significant Deterioration Regulation*

By means of the Clean Air Act, Congress has fashioned an orderly, systematic plan for the control of air pollution in the United States. A review of that plan, step-by-step through the specific operative sections of the Act, reveals that Congress' plan is totally devoid of any legislative authority for a no significant deterioration standard.

The plan begins in Section 103 with a directive to the Administrator of EPA to "conduct an accelerated research program" to improve the knowledge of the adverse effects of air pollution on health and welfare. 42 U.S.C. § 1857b(f)(1). With that knowledge the Administrator is then required under Section 108, 42 U.S.C. § 1857c-3, to issue "air quality criteria" for each air pollutant that, in his judgment, has an "adverse effect on public health and

welfare." Such criteria are to be based on the "latest scientific knowledge" as to the "identifiable effects on public health and welfare" from the presence of such pollutants in the air, and are to contain information on the technology available to control such pollutants.

The next step in the statutory plan is for the Administrator to prescribe national *primary* (health) and *secondary* (welfare) ambient air quality standards under Section 109[18] for each air pollutant listed in the Section 108 criteria. The statute specifically requires the primary standards to be sufficient to protect the public health, "allowing an adequate margin of safety." The secondary standards are required "to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." Every conceivable adverse effect is to be accounted for in the secondary standards, as the Act specifically defines effects on welfare as including:

> "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being."[19]

Both the primary and secondary standards may be revised from time to time as new knowledge on effects is developed.

The statutory plan then calls for each state to develop

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[18] 42 U.S.C. § 1857c-4.

[19] Section 302(h), 42 U.S.C. § 1857h(h). This language was expressly intended to extend to "welfare effects and aesthetics in their *broadest* definition." Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 7 (1970) (emphasis added). In proposing the significant deterioration regulations, EPA cited the protection of aesthetic, scenic and recreational values as the objective of the regulations. 38 Fed. Reg. 18987 (July 16, 1973) (A. 98a). Given the broad definition of "welfare" in § 302(h), it is clear that Congress intended those factors to be protected under the secondary standards.

and submit to EPA for approval a plan for the implementation, maintenance and enforcement of the national primary and secondary air quality standards within the state. Clean Air Act § 110.[20] If the state plan satisfies eight criteria specified in Section 110,[21] all of which relate to the achievement and maintenance of primary and secondary standards, the section provides that "the Administrator shall approve" the plan.

Congress also carefully planned for the control of pollution that might result from industrial growth in the cleaner areas of the Nation. Accordingly, Section 111[22] of the Clean Air Act requires the Administrator to establish performance standards applicable to new or modified stationary sources that may contribute significantly to air pollution. Such standards, known as "new source performance standards," require the "best system of emission reduction" available,[23] and are applicable even in those areas of the Nation where the ambient air quality is better than that required under the national primary and secondary standards.[24] As such, the new source performance standards apply even where

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[20] 42 U.S.C. § 1857c-5. The primary standards must be met within *three years* from the date of EPA approval of the plan, and the secondary standards must be achieved within a *"reasonable time"* § 110(a)(2)(A)(i), 42 U.S.C. § 1857c-5(a)(2)(A)(i). The section contains no reference to tertiary standards or any time period for attaining them.

[21] See discussion pages 19-24 *infra*.

[22] 42 U.S.C. § 1857c-6.

[23] Section 111(a)(1), 42 U.S.C. § 1857c-6(a)(1).

[24] Section 111 requires that new source performance standards be prescribed for all categories of stationary sources that the Administrator determines may contribute significantly to air pollution that causes or contributes to the endangerment of public health or welfare, regardless of where individual plants within those categories are located.

there are no known adverse effects on public health or welfare.

As can be seen from the foregoing operative sections of the Act, Congress has carefully drafted a detailed plan for the protection of health and welfare from air pollution—a plan utilizing the latest scientific knowledge of the effects of air pollution, a plan that assures an adequate margin of safety for the protection of public health, a plan that protects against all known or anticipated adverse effects on every conceivable aspect of public welfare, and a plan that requires use of the best emission control technology available for new and modified sources of potential pollution. A more comprehensive and administratively workable statutory program is difficult to imagine.[25]

These statutory provisions contain no suggestion, either by direct statement or by inference,[26] that Congress' plan for air pollution control also includes the concept of no significant deterioration in clean air areas. Indeed, when viewed in the context of the operative sections of the Act, a no significant deterioration policy produces absurd results that render the well structured and logical plan of the operative sections pointless—forcing the agency to promulgate a tertiary standard nowhere mentioned in the Act; to require even more than "an adequate margin of safety . . . to pro-

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[25] By EPA's own account, the application of these sections, together with other regulatory actions taken under the Clean Air Act (including restrictions on sulfur content of fossil fuel and emission standards for new motor vehicles) have already had the effect "of attaining or maintaining air quality significantly better than the national secondary standards in many places." 38 Fed. Reg. 18986-87 (July 16, 1973) (A. 95a-96a). *Accord,* EPA Annual Report to Congress, "Progress in the Prevention and Control of Air Pollution in 1974," pp. 79-85.

[26] The Court of Appeals concedes that "none" of the eight criteria specified for EPA approval of state implementation plans "implies a nondeterioration standard." 540 F.2d at 1124 (A. 55a). See pages 20-21 *infra.*

tect the public health";[27] to regulate against concentration levels that have no "known or anticipated adverse effects" on public welfare;[28] in short, to abandon the "latest scientific knowledge . . . of all identifiable effects on public health or welfare,"[29] and to attempt to regulate the *unknown* and the *unanticipated*.

If Congress truly had intended such results, it is inconceivable that they would not have been provided for in the operative sections of the Act. To have detailed in section after section precisely how EPA was to develop, implement and enforce the primary, secondary and new source performance standards and neglected even to mention the development of yet another standard, which would impact upon 80 percent of the country's land area, is absurd. This omission from the precisely drafted operative sections of the Act is overwhelming evidence that such a standard never was intended by Congress.

2. *Section 110 Of The Clean Air Act Mandates Approval By EPA Of State Implementation Plans That Satisfy Eight Specified Criteria, None Of Which Implies A No Significant Deterioration Standard.*

The no significant deterioration regulations revise the state plans of all fifty states for the implementation of the national primary and secondary standards. In promulgating the regulations, EPA has told the states that in addition to provisions for the achievement and maintenance of the national standards, their plans must also prescribe a tertiary standard more stringent than the primary and secondary standards. Such a requirement not only lacks statutory au-

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[27] Clean Air Act § 109(b)(1), 42 U.S.C. § 1857c-4(b)(1).

[28] *Id.* § 109(b)(2), 42 U.S.C. § 1857c-4(b)(2).

[29] *Id.* § 108(a)(2), 42 U.S.C. § 1857c-3(a)(2).

thority under the Clean Air Act, but it directly conflicts with the mandatory provisions of Section 110 with regard to EPA approval of state plans.

At the heart of this controversy are the requirements for the content of state implementaion plans which have been developed and submitted to EPA for approval under Section 110 of the Clean Air Act, 42 U.S.C. § 1857c-5. The *only* section of the Clean Air Act that addresses the requirements for state implementation plans is Section 110. In clear and precise language, that section specifies *eight distinct requirements* for state implementation plans—all related to the achievement and maintenance of the primary and secondary standards of Section 109 of the Act, *none requiring goals more stringent than the Section 109 standards.*

Specifically, Section 110(a)(2), 42 U.S.C. § 1857c-5 (a)(2), requires that each state plan must (1) achieve the primary standards in no less than three years, and the secondary standards "within a reasonable time"; (2) contain measures (emission limitations, land-use and transportation controls) adequate to achieve and maintain the primary and secondary standards; (3) provide for monitoring and the collection of data; (4) provide for preconstruction review of new sources to assure that the primary and secondary standards will not be violated; (5) provide for intergovernmental cooperation in the attainment and maintenance of primary and secondary standards; (6) provide necessary staffing and funding to administer the plan; (7) provide for periodic testing of motor vehicles; and (8) provide procedures for revisions to account for changes in the primary and secondary standards.

Where each of the foregoing criteria is satisfied, Section 110 imposes the unequivocal requirement that the Administrator "shall approve" the state's plan.

It is undisputed by the court below that none of the criteria of Section 110 provides a basis, express or implied, for the requirement of no significant deterioration provisions in state plans.[80] That court has concluded, however, that the mandatory "shall approve" language of Section 110 does not mean what it says, at least not with regard to the application of state plans to the so-called clean air areas, and that indeed the Administrator is required to *dis*approve state implementation plans that do not include a sufficient no significant deterioration standard for such areas. Recent opinions of this Court interpreting that language of Section 110, however, simply do not permit such a construction.

In *Train* v. *NRDC,* 421 U.S. 60 (1975), this Court held that state implementation plans may allow for variances for individual pollution sources so long as the plans achieve the national primary and secondary air quality standards by the statutory compliance date. In so holding, this Court necessarily examined the requirements of the Clean Air Act for the content of state implementation plans and concluded that Section 110(a)(2) "quite clearly mandates approval of any plan which satisfies its minimum conditions." 421 U.S. at 71 n. 11. The *Train* opinion further explained:

> "Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which

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[80] Writing for the court, Judge Wright concedes: "[A] 1970 amendment to the Act, Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2), states that the Administrator 'shall approve' a state implementation plan which meets the criteria listed in that section, none of which implies a nondeterioration standard." 450 F.2d at 1124 (A. 55a).

> satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." 421 U.S. at 79. (Emphasis in original.)

The emphasis on the Section 110 criteria for the content of state implementation plans was restated in *Hancock* v. *Train,* 426 U.S. 167, 169-170 (1976), where this Court observed that EPA is "required to approve each State's implementation plan as long as it was adopted after public hearings and satisfied the conditions specified in § 110(a)(2)."

This Court's most recent interpretation on the matter was provided in *Union Electric Co.* v. *EPA,* 427 U.S. 246 (1976), where the Court rejected the relevance of technological feasibility—a factor not specifically prescribed by Section 110—to the statutory standards for approval by EPA of state implementation plans. The opinion states:

> "The provision [§ 110(a)(2)] sets out eight criteria that an implementation plan must satisfy and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator 'shall approve' the proposed state plan." 427 U.S. at 257.

As against the suggestion that the Administrator might properly require factors other than those specified by Section 110, the *Union Electric* opinion firmly instructs:

> "The mandatory 'shall' makes it quite clear that the *Administrator is not to be concerned with factors other than those specified . . . .*" *Id.* (Emphasis added.)

The Court of Appeals below has discounted the relevance of the *Train, Hancock* and *Union Electric* decisions to the present case by arguing that the precise issue of significant deterioration was not before the Supreme Court in those cases. 540 F.2d at 1128-29.[81] What the Court of Appeals neglects to recognize, however, is that the fundamental issue addressed by this Court in each of the passages quoted above is precisely the fundamental issue of this case—whether state implementation plans need to satisfy requirements other than those specified in Section 110. On that basic issue, this Court has ruled definitively that a state implementation plan is subject *only* to the requirements of Section 110, and no others.

The inconsistency of the Court of Appeals' decision with the mandatory language of Section 110 is further revealed by the limited authority granted the Administrator under the statute for revisions of state plans. Paragraph (c) of Section 110 provides (again in clear, precise terms) that the Administrator shall adopt a state implementation plan, or revisions thereof, *only under three specified conditions:* (1) if the state fails to submit its own plan within the time prescribed for attainment of the primary and secondary standards; (2) if the state plan or any portion thereof fails to be in accord with the stated requirements of Section 110; or (3) if the state fails to revise its plan when necessary to meet the then current primary and secondary standards. 42 U.S.C. § 1857c-5(c). The statute authorizes EPA revisions of state plans in no other situations.

In promulgating the no significant deterioration regu-

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[81] The Court of Appeals suggests that in *Train*, for example, the Supreme Court was concerned only with dirty air, not clean air. 540 F.2d at 1128 (A. 64a). To the contrary, *Train* involved the question of individual variances from state implementation plans, plans that cover the *entire* air region of a state, "clean air" as well as "dirty."

lations, EPA has revised the implementation plan of every state in the Nation. In no case, however, has any such revision been based on one of the three conditions specified for revisions in Section 110(c). Again, the Court of Appeals' opinion cavalierly sweeps this "nicety" aside, conceding that with respect to such procedural concerns "the requirement of prevention of significant deterioration does not fit neatly into the statutory scheme," and that the Administrator's promulgation of the regulations was "not within the defined processes of Section 110(c)." 504 F.2d at 1137 (A. 82a-83a). Instead, the explicit language of Section 110(c) does not mean what it says, and the Administrator can in "an exercise of discretion," *id.*, disapprove and revise a state plan to achieve an unstated objective of a purpose clause even where the state has (i) produced a plan to achieve the primary and secondary ambient standards, (ii) satisfied the specific eight criteria of Section 110, and (iii) not failed to revise the plan to meet ambient standards. If the Administrator's discretion is so broad, one wonders why Congress even bothered to seek to limit the Administrator's authority to revise state plans under Section 110(c).

In sum, Congress has spoken clearly as to the required content of state implementation plans and the authority of EPA to revise those plans. Section 110 obligates the Administrator of EPA to approve any state plan that satisfies eight specified criteria; it does not authorize the Administrator to force additional requirements upon the state plans, whether in the form of a no significant deterioration standard or otherwise. In going outside the four corners of Section 110 and attempting by brute force to shoehorn the no significant deterioration regulations into the orderly and explicit structure of the Act, the lower court is unquestionably in error.

3. *Section 116 Of The Clean Air Act Makes Clear Congress' Intention That The States Should Be Permitted To Adopt Air Quality Standards More Stringent Than The Primary And Secondary Standards, But That They Should Not Be Required To Do So.*

The decision below also conflicts with the clear language of Section 116 of the Clean Air Act, 42 U.S.C. § 1857d-1, regarding the *permissive* authority of the states to adopt no significant deterioration standards more stringent than the primary and secondary standards. That section provides that nothing in the Act "shall preclude or deny the *right* of any state . . . to adopt or enforce . . . any standard or limitation respecting emissions of air pollutants," provided such standard is not "less stringent" than the standards or limitations in effect under a Section 110 implementation plan—*i.e.*, the national primary and secondary standards. (Emphasis added.) By its very terms, Section 116 accords the states the *right*, not the *duty* to adopt more stringent standards.

This provision, originating in the Senate bill, was designed to "restate the intent of . . . the Air Quality Act of 1967 which provided assurance that States, localities, inter-municipal and interstate agencies may adopt standards and plans to achieve a higher level of ambient air quality" than the national standards. Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 15 (1970).

As a permissive statute, Section 116 makes sense in the context of the operative sections of the Clean Air Act previously discussed. The entire focus of Sections 108, 109 and 110 is on the achievement and maintenance of the national primary and secondary standards.[32] Concern for potential pollution effects of industrial growth in clean air areas is addressed, in turn, by the authority for new source

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[32] See discussion pages 15-24 *supra*.

performance standards in Section 111.[33] Recognizing that "the prevention and control of air pollution at its source is the primary responsibility of State and local governments,"[34] however, Congress acted in Section 116 to preserve to the states the right to adopt air pollution control standards more stringent than the federal standards if they desire to do so.

The policies favoring such permissive authority in the states are obvious. A state is in the best position to weigh the relative costs and benefits to it and its citizens that might result from more stringent standards; the state is most sensitive to the local economic and employment needs to ensure the productive capacity of its populace; the state has the best appreciation for its energy resources potential and the effect utilizing such resources would have on desirable environmental objectives. In short, so long as the national primary and secondary standards of the Clean Air Act are fulfilled, the states should have discretion as to any further limitations imposed, and Section 116 assures them that discretion.

Congressman Staggers stated the point well, saying during the floor debates on the 1970 Act:

> "We are not holding [the States] back, but we say that all the States must comply with the nationwide standards. We think at the present time this is the best we can do. *If any State wants stronger standards, we think it will know best what it should do or how far it should go.*" 116 Cong. Rec. 19205 (1970) (emphasis added).

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[33] See discussion pages 17-18 *supra*.

[34] Clean Air Act, § 101(a)(3), 42 U.S.C. § 1857. "[S]tate and local governments retain responsibility for the basic design and implementation of air pollution strategies . . . ." Pennsylvania v. EPA, 500 F.2d 246, 262 (3d Cir. 1974).

The Court of Appeals' approach to Section 116 is simply to ignore it. In so doing, that court has rendered Section 116 totally meaningless and a frivolous legislation act. But the explicit language of the statute cannot be ignored. As Section 116 makes absolutely clear, Congress had no intention of forcing the states to adopt standards more stringent than the primary and secondary standards unless they freely choose to do so.

4. *The "Protect and Enhance" Language Of The Purpose Clause Of The Clean Air Act Cannot Create A Substantive No Significant Deterioration Standard That Is Precluded By The Operative Sections Of The Act.*

The sole statutory basis cited by the Court of Appeals for the no significant deterioration regulations is a vague recital in the "findings and purposes" clause of the Clean Air Act that one of its purposes is "to protect and enhance the quality of the Nation's air resources." Clean Air Act § 101(b)(1), 42 U.S.C. § 1857(b)(1). Over and against the contrary language of the operative sections of the Act, the Court of Appeals is content to find in the phrase "protect and enhance" pervasive regulatory authority that goes far beyond the national primary and secondary standards. The court below has accorded that simple phrase a status it does not deserve.

To begin with, it has long been recognized that the preamble to an act of Congress, such as Section 101, "cannot enlarge or confer powers." *Yazoo & Mississippi Valley R. R. Co.* v. *Thomas,* 132 U.S. 174, 188 (1889). Indeed, where the preamble conflicts with the operative sections of an act, this Court has said:

> "Although a preamble has been said to be a key to open the understanding of a statute, we must not be understood as adjudging that a statute, clear and un-

> ambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute." *Price* v. *Forrest,* 173 U.S. 410, 427 (1899).

More recently, this Court has observed that "legislative intention, without more, is not legislation." *Train* v. *City of New York,* 420 U.S. 35, 45 (1975).[35]

Section 101(b)(1) does not itself purport to confer powers on EPA or any other governmental agency or official. All regulatory powers are conferred by the operative provisions of the Act, none of which contemplates EPA authority for a no significant deterioration standard and several of which actually conflict with any suggestion of such authority.[36] The lower court's insistence that the Section 101(b) preamble clause prevails nevertheless over the operative sections of the Clean Air Act finds no support in the relevant case law. Indeed, that court itself had previously observed:

> "[T]he general section setting forth legislative goals neither constitutes an operative section of the statute nor prevails over the specific provisions. . . ." *Bissette* v. *Colonial Mortgage Corp. of D.C.,* 477 F.2d 1245, 1246 n.2 (D.C. Cir. 1973).

Moreover, the lower court's reliance upon the "protect and enhance" language as the basis for a no significant deterioration standard is even logically inconsistent with the terms of the Section 101(b) purpose clause itself. The lower court's focus was limited to the words "to protect and enhance the quality of the Nation's air resources." But the

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[35] *Accord,* Connecticut Light & Power Co. v. FPC, 324 U.S. 515, 527 (1945); Coosaw Mining Co. v. South Carolina, 144 U.S. 550, 563 (1892).

[36] *I.e.,* Section 110, see discussion pages 19-24, *supra,* and Section 116, see discussion pages 25-27 *supra.*

sentence does not end there; it goes on to state the reason for the protection and enhancement of air quality—*i.e.*, "to promote the *public health* and *welfare* and the *productive capacity* of its population." (Emphasis added.) When read in its entirety, the purpose clause dovetails logically with the health and welfare language of the operative sections of the Act (§§ 108, 109, 110 and 111) and requires the promulgation of standards, consistent with the latest scientific knowledge as to the identifiable effects of pollution levels, to protect public health (primary standards) and welfare (secondary standards). To suggest that the Agency is required to focus on the scientifically unknown or unanticipated has no basis in any of the language of the Act, including Section 101(b).

In addition, as indicated in the studies and comments cited on pages 7-11 *supra*, the lower court's holding ignores the equally important purpose of the Clean Air Act, as stated in Section 101(b), to promote the *productive capacity* of the Nation's population—a goal that is severely inhibited by the EPA regulations.

Viewed another way, the language of Section 101(b) is but a synonymous expression of the goal of Section 109(b) to ensure "the *attainment* and *maintenance*" of air quality to protect the public health and welfare. Thus, Section 101(b) contemplates the achievement of national ambient standards that will "protect [or maintain] and enhance [or attain] the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."

In the final analysis, the explicit language of the Clean Air Act provides not one shred of support for the proposition that the no significant deterioration regulations are statutorily authorized. The operative sections of the Act clearly negate such a conclusion, and the preamble language

of Section 101 is totally insufficient as a basis for substantive regulations.

B. The Legislative History Of The Clean Air Act Reveals That Congress Did Not Intend For EPA To Promulgate Air Quality Standards More Stringent Than The Primary And Secondary Standards.

Recognizing the weakness of its conclusion in terms of the clear statutory language of the Clean Air Act, the Court of Appeals jumps to a review of the Act's legislative history, suggesting that when a specific statutory scheme conflicts with the congressional purpose for an act—in this case a purpose the court is simply willing to assume—"our first task is to examine the act's legislative history to determine whether the specific provision is reconcilable and consistent with the intent of Congress." 540 F.2d at 1124 (A. 55a). Focusing on a single excerpt from the committee report on the Senate bill, the lower court incredibly concludes that it has found no indication, nor been cited to any indication in the legislative history, "that Section 110 was intended in any way to vitiate the nondeterioration mandate contained in the Senate report." *Id.* at 1126 (A. 59a). The Court of Appeals has now left us standing on our heads, seeking in vain to find statutory language to support ambiguous language in a committee report!

Under rudimentary principles of statutory construction, express statutory language, not excerpts from committee reports and debates, is the best measure of legislative intent. Legislative history is relevant as a tool of interpretation only where the operative language of the statute is ambiguous, not where it is perfectly clear as in this case.

In case after case, this Court has emphasized that legislative history cannot "justify deviation from the plain language of a statute." *United States* v. *Oregon*, 366 U.S. 643,

648 (1961).[37] In previous cases, the court below has agreed, observing:

> "It is, after all, the plain language of the statute which *all* the members of both houses of Congress must approve or disapprove. The courts should not allow that language to be significantly undercut." *Calvert Cliffs' Coord. Comm.* v. *AEC*, 449 F.2d 1109, 1127 (D.C. Cir. 1971).

Assuming for purposes of argument only that the language of the Clean Air Act is ambiguous on the subject, a review of the entire legislative history confirms that Congress did not intend a tertiary standard more stringent than the national primary and secondary standards.

1. *"Protect and Enhance" Originated In The Air Quality Act Of 1967, But The Legislative History Of That Act Attaches No Substantive Significance To The Phrase.*

The phrase "protect and enhance" originated in the Air Quality Act of 1967, Pub. L. No. 90-148, § 101(b)(1), 81 Stat. 485.[38] That Act placed responsibility for the development of ambient air quality standards with the states, not EPA, but like the 1970 Act its focus was on the *known* effects of pollution levels on public health and welfare. The intent of Congress on this issue is made clear by the following from the House Committee report that accompanied the bill:

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[37] *Accord,* Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947); Kuehner v. Irving Trust Co., 299 U.S. 445, 449 (1937); Adams Express Co. v. Kentucky, 238 U.S. 190, 199 (1915).

[38] This section of the 1967 Act amended the Clean Air Act of 1963, Pub. L. No. 88-206, § 1(b), 77 Stat. 392, which used the word "protect" alone, not the word "enhance." There has been no suggestion that the legislative history of the 1963 Act accorded substantive significance to the word "protect."

> "The most important objective of the bill is to insure that air pollution problems will, in the future, be controlled in a systematic way. To this end, the bill contains provisions intended to insure that control action will be taken in accordance with the regional nature of the air pollution problems and that *sources of air pollution will be controlled to the extent consistent with available knowledge of the adverse effects of pollutants on health and welfare and with available control technology.*" H. Rep. No. 728, 90th Cong., 1st Sess. (1967), U.S. Code, Cong. & Admin. News 1949 (1967) (emphasis added).

Also similar to the 1970 Act, the 1967 law required the ambient air quality standards to be keyed to "criteria" to be developed by the Secretary of HEW. In explaining the nature and the purpose of the "criteria," the House Committee emphasized the definable and known effects of air pollution on public health and welfare, saying:

> "The issuance of such criteria is among the prerequisites for the development of air quality standards by the States. It is essential, then, that there be no confusion about the purpose of air quality criteria. . . . They describe the effects that can be expected to occur whenever and wherever the ambient level of a pollutant *reaches or exceeds* a specific figure for a specific time period. Thus, *they define the health and welfare considerations that must be taken into account in the development of standards and regulations.*" H. Rep. No. 728, 90th Cong., 1st Sess. (1967), U.S. Code, Cong. & Admin. News 1951 (1967) (emphasis added).

It is thus clear that under the 1967 Act the air quality standards and the criteria upon which they were to be based were to be addressed to *known effects* of pollutants on health and welfare, and that a pollutant was not to be

subject to control until it "reaches or exceeds"[39] a level *known* to have adverse effects.[40] State implementation plans, in turn, were required to insure that the air quality standards would be met within a reasonable time, *nothing more*.[41]

Moreover, the legislative history of the 1967 Act is totally silent as to the significance, if any, of the "protect and enhance" language or any substantive rule-making authority it was intended to confer. If the language was intended to have the effect the Court of Appeals has accorded it, an explicit statement of that fact certainly would have been provided when the phrase was first expressed.

2. *The Legislative History Of The 1970 Amendments Does Not Support The Court Of Appeals' Rejection Of The Clear Statutory Language.*

A review of the legislative history of the 1970 Clean Air Act Amendments also discounts any theory that Congress intended a policy of no significant deterioration in addition to the primary and secondary standards under Section 109, or the new source performance standards under Section 111. This is clearly evident in the discussion of the outer-limits of scientific knowledge and the relation of such knowledge to the protection of public health and welfare. Acknowledging

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[39] H. Rep. No. 728, 90th Cong., 1st Sess. (1967), quoted above in the text.

[40] *Accord,* floor statement by Senator Muskie (117 Cong. Rec. 19172 (1967)):

> "The fact that an area is not now a problem area will not mean that controls will never be required. When the air quality of any region deteriorates below the level required to protect public health and welfare, the Secretary is required to designate that region for the establishment of air quality standards, enforceable by the Federal Government if the States fail to act."

[41] Air Quality Act of 1967, Pub. L. No. 90-148, § 108(c)(1), 81 Stat. 491.

the then existing limits of scientific knowledge, the Senate Public Works Committee observed:

> "The Committee is aware that there are many gaps in the available scientific knowledge of the welfare and other environmental effects of air pollution agents. . . . [T]he Committee expects that the Department will intensify research on environmental and other economic effects of air pollution. A great deal of basic research will be needed to determine the long-term air quality goals which are required to protect the public health and welfare from any potential effects of air pollution. *In the meantime, the Secretary will be expected to establish such national goals on the basis of the best information available to him.*" Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970) (emphasis added).

In the view of the Senate Committee, then, the problem of inadequate scientific knowledge was to be approached in terms of an emphasis on intensified research into the health and welfare effects of air pollution[42] with periodic adjustments in the primary and secondary standards to meet such knowledge, not by means of some arbitrarily restrictive standards having no scientific basis.

Further, any suggestion that a no significant deterioration policy is necessary to protect the health of those persons particularly vulnerable to the effects of air pollution ignores Congress' expressed intent as to the primary standards. With specific reference to the most sensitive members of the public (as well as the need to protect against uncertain health

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[42] Section 103(f)(1) of the Act directs the Administrator to conduct "an accelerated research program" to improve knowledge of the contribution of air pollution to adverse health and welfare effects. 42 U.S.C. § 1857b(f)(1). See discussion page 15 *supra*. Under the decision below, such a research program would be unnecessary as the degree of control required to protect health and welfare would no longer be the ultimate standard.

hazards), the Senate Committee stressed the requirement for *safety margins* in the primary standards, saying:

> "In setting such air quality standards the Secretary should consider and incorporate not only the results of research summarized in air quality criteria documents, but also the need for margins of safety. Margins of safety are essential to any health-related environmental standards if a reasonable degree of protection is to be provided against hazards which research has not yet identified.
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> * * *
>
> "Ambient air quality is sufficient to protect the health of such [sensitive] persons whenever there is an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups from exposure to the ambient air. *An ambient air quality standard, therefore, should be the maximum permissible ambient air level of an air pollution agent or class of such agents (related to a period of time) which will protect the health of any group of the population.*" Sen. Rep. No. 1196, 91st Cong., 2d Sess. 9-10 (1970) (emphasis added).

To assert that some additional or extraneous standard, such as EPA's no significant deterioration regulations, is needed to protect the health of those particularly vulnerable to the effects of pollution is to misread the very purpose intended for primary standards. If adverse effects are found at air quality levels better than the present standards, the Clean Air Act specifically requires those standards, as well as the secondary standards, to be revised and made as stringent as necessary to protect public health and welfare.[43] In expressly providing for judicial review of the primary, secondary and new source performance standards, Con-

[43] Section 109(b)(1) and (2), 42 U.S.C. § 1857c-4(b)(1) and (2).

gress has made EPA strictly accountable for the development of standards consistent with the Act.[44]

The Court of Appeals cites but a single excerpt from the Congressional committee reports on the 1970 Act to support its finding of "a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards." 540 F.2d at 1124 (A. 55a). That excerpt, from the Senate report, reads:

> "In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative." Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970).

Although *not* quoted by the Court of Appeals, the Senate report further states:

> "Given the various alternative means of preventing and controlling air pollution—including the use of the best available control technology, industrial processes, and operating practices—and care in the selection of sites for new sources, land use planning and traffic controls —deterioration need not occur." *Id.*

When carefully analyzed in its entirety, the foregoing language supports not a tertiary standard of nondegradation, but the belief that air quality *need* not deteriorate given the anticipated effects the primary and secondary standards will have when complemented by the new source performance standards of Section 111 and other operative sections of the Act. The phrases—"the maximum extent

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[44] Section 307(b)(1), 42 U.S.C. § 1857h-5(b)(1).

practicable" and "except under circumstances where there is no available alternative"—for example, clearly discount any absolute policy of no degradation. Further, the reference to "the best available control technology, industrial processes, and operating practices," is a direct reference to the new source performance standards as contemplated under Section 113 of the Senate bill[46] (Section 111 as enacted). Similarly, the reference to "care in the selection of sites for new sources, land use planning and traffic controls," derives directly from Section 111(a)(2)(D) of the Senate Bill (Sections 110(a)(2)(B) and (D) and 110(a)(4) as enacted), which was addressed exclusively to the implementation, maintenance and enforcement of the primary and secondary standards.[46]

In short, the excerpt from the Senate report relied upon by the Court of Appeals does nothing more than emphasize the important role of the various control options, principally the new source performance standards, in the clean air areas. This is borne out by other portions of the Senate report. Thus in referring to the authority for new source performance standards under Section 111, the Senate report states:

> "Maintenance of existing high quality air is assured through provision for maximum control of new major pollution sources."[47]

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[46] "Such standards shall reflect the greatest degree of emission control which the Secretary determines to be achievable through application of the latest available control technology, processes, operating methods, or other alternatives." S. 4358 § 113(b)(2). Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 91 (1970). As enacted, Section 111 requires "the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 1857c-6(a)(1).

[46] Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 87 (1970).

[47] *Id.* at 2.

Again, the report emphasizes:

> "The overriding purpose of this section would be to prevent new air pollution problems, and toward that end, maximum feasible control of new sources at the time of their construction is seen by the committee as the most effective and, in the long run, the least expensive approach."[48]

The floor debates, as well, stressed the central role of the new source performance standards in protecting air quality in the clean air regions. As explained by Senator Randolph, Chairman of the Senate Committee on Public Works:

> "The overriding purpose of performance standards for new stationary sources is to prevent the occurrence of new air pollution problems. These standards will insure that when an industry moves into any area with low pollution levels, that this new facility does not appreciably degrade the existing air quality." 116 Cong. Rec. 33075 (1970).

Similarly, Senator Dole observed:

> "My State of Kansas is fortunate that it does not face so many of the severe problems of air pollution confronting more intensively industrialized States. Passage of this bill will assist in remedying the problems which do exist and insure preservation of the high quality of air Kansas presently enjoys . . . .
>
> "Under this bill, we can continue to encourage the location of new industry in Kansas and other rural unspoiled regions without fear of polluting the high quality of air found there. At the same time, national standards for new stationary sources will not place some States at a comparative disadvantage affecting industry decisions on plant locations." *Id.*, at 32923.

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[48] *Id.* at 16.

The Court of Appeals also cites as administrative interpretation accepted by the Congress in passage of the 1970 Act, testimony to the Senate Committee by then HEW Secretary Finch.[49] At best, the excerpt cited from Secretary Finch's testimony is ambiguous, particularly in view of his further comment (not cited by the court below) that makes clear that he was advocating the use of the best emission control technology available, ultimately enacted in Section 111 of the 1970 Act, as the key to protection of clean air regions. In the words of Secretary Finch:

> "In the years ahead, however, many potentially significant new stationary sources of air pollution will come into being as a result of the Nation's growing demands for electric power, manufactured goods, and other necessities and amenities of modern life. Large stationary sources, such as electric generating plants, iron and steel mills, and petroleum refineries frequently have adverse effects not only on public health and welfare in their own communities but also on air quality over broad geographic areas. This problem is one that demands national attention. If we are ever to begin preventing air pollution, instead of just attacking it after the fact, then *we must at least insure that major new stationary sources, wherever they are located, are designed and equipped to reduce emissions to the minimum level consistent with available technology.* The application of national emission standards would also tend to minimize the competitive advantage of locating a new facility in an area where emission standards are

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[49] 540 F.2d at 1125 (A. 57a), quoting from *Air Pollution—1970*, Hearings Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, Part I, 132-133 (1970). The Court of Appeals also relied upon an administrative interpretation of the 1967 Act by the National Air Pollution Control Administration within the Department of HEW. 540 F.2d at 1125 n. 30 (A. 56a). It is significant, however, that the interpretation cited was never implemented by HEW and indeed it was never even proposed as a federal regulation.

> less rigorous than in other areas. This would eliminate 'polluter havens.' " A Legislative History of the Clean Air Amendments of 1970, 93d Cong., 2d Sess., Vol. 2, at 975 (Jan. 1974) (emphasis added).

The one provision of the Senate bill that arguably might have *required* state implementation plans to impose a tertiary standard more severe than the primary and secondary standards was deliberately deleted from the Conference bill. Section 111(a)(1) of the Senate bill, in stating the requirement for public hearings on state implementation plans, had provided:

> "Unless a separate public hearing is provided, *each State shall consider* adoption of ambient air quality standards which are *more restrictive* than the national ambient air quality standards at the hearing required by this paragraph."[50] (Emphasis added.)

In the Conference bill as enacted, however, this sentence was changed to read as follows:

> "Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standards at the hearing required by the first sentence of this paragraph" [*i.e.*, the hearing on the plan to achieve the primary standard].[51]

The change in language was made deliberately to tie the state implementation plans to the *primary* and *secondary* standards, the Conference report explaining:

> "The Senate bill required that each State consider adoption of more stringent air quality standards than the national standards at its public hearing on the

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[50] S. 4358, § 111(a)(1), Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 87 (1970).

[51] Section 110(a)(1), 42 U.S.C. § 1857c-5(a)(1).

> proposed implementation plan, unless a separate hearing was held for that purpose.
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> "* * * The Senate amendment was modified to provide for primary and secondary standards, the former relating to public health and the latter to public welfare."[82]

As can be seen from the above review, the legislative history of the 1970 Act is totally deficient as a basis for a no significant deterioration requirement, particularly in view of the clear statutory language to the contrary. Rather than establishing such a basis, the legislative history in fact demonstrates exactly the opposite—the one legislative proposal suggesting that the states consider adoption of standards more stringent than the primary and secondary standards was deleted before enactment.

3. *Subsequent Activities In Congress With Regard To No Significant Deterioration Legislation Do Not Establish A Legislative Intent For The 1970 Clean Air Act That Did Not Exist When That Act Was Enacted.*

As a final refuge for support, the Court of Appeals has referred to "recent congressional statements" as supporting "the historic existence of a requirement of nondeterioration." 540 F.2d at 1127 (A. 61a). Specifically, the court

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[82] Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. 44 (1970). That the Conference Committee contemplated land use restrictions only where necessary to achieve the primary and secondary standards was made clear in the summary of the Conference agreement presented by Senator Muskie on the Senate floor: "Implementation of standards will require changes in public policy: Land use policies must be developed to prevent location of facilities which are not compatible with implementation of national standards. States must review the location of every new stationary source before construction to assure no interference with attainment of the standards." A Legislative History of the Clean Air Amendments of 1970, 93d Cong., 2d Sess., Vol. 1, at 132 (Jan., 1974).

below has cited proposals offered in both houses[53] in 1976 to incorporate explicit directives into the Clean Air Act for no significant deterioration standards. A Conference bill on the subject failed of passage prior to adjournment of the 94th Congress.

This Court has consistently rejected such attempts at *ex post facto* legislative history. In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968), this Court admonished:

> "[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any, significance."[54]

This is particularly true where the subsequent legislative proposal has failed of enactment.

> "[s]tatutes are construed by the courts with reference to the circumstances existing at the time of passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here." *United States* v. *Wise*, 370 U.S. 405, 411 (1962).[55]

Moreover, even with proposals for a legislative "cure" of this problem, the view that such legislation would serve as a mere "clarification" of existing policy has been substantially disputed. Senator Baker, for example, who had a

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[53] H.R. 10498, S. 3219.

[54] *Accord*, Haynes v. United States, 390 U.S. 85, 87 n.4 (1968). The Court of Appeals for the District of Columbia Circuit normally agrees: Subsequent legislative comment provides a "hazardous basis for inferring the intent of [an] earlier Congress." Portland Cement Ass'n. v. Ruckelshaus, 486 F.2d 375, 382 (D.C. Cir. 1973).

[55] *Accord*, Waterman Steamship Corp. v. United States, 381 U.S. 252, 269 (1965); Fogarty v. United States, 340 U.S. 8, 14 (1950).

leading role in the formulation of the 1970 Act, observed during oversight hearings in 1972:

> "I was on the subcommittee in 1967 when we came to terms with this and in 1970 with the clean air amendments and I stand subject to correction by the staff and other members if I am in error, but it is my recollection and it is my interpretation of the statute as passed that nondegradation is a term that was never embodied nor imbeded [sic] in the statute itself." Implementation of the Clean Air Act Amendments of 1970—Part 1, Hearings Before the Subcommittee on Air and Water Pollution, Senate Committee on Public Works, 92d Cong., 2d Sess. 275 (1972).

Further, the debates on the 1976 bills are virtually riddled with comment that the 1970 Act did not contemplate a no significant deterioration standard.[56] Even members of Congress who now favor controls more stringent than the primary and secondary standards in clean air areas candidly concede the point. Senator McClure, for example, while supporting nondeterioration as a new policy, observed:

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[56] "It seems obvious that this was not the intent of Congress. Congress would never establish a policy which has such broad and potentially devastating ramifications merely by putting one sentence in the 'Purposes' section of the legislation." H. Rep. No. 94-1175, 94th Cong., 2d Sess. 489 (1976) (Reps. Devine, Broyhill, Carter, Brown, Skubitz, Collins, McCallister); "I doubt that there is a Member of this body in office in 1970, who realized that the policy of nondeterioration was embodied in the Clean Air Act that we then voted on." 122 Cong. Rec. S13140 (Aug. 3, 1976) (Sen. Moss); "I do not believe that Congress intended such a policy when the 1970 Act was passed." 122 Cong. Rec. S13155 (Aug. 3, 1976) (Sen. Garn); 122 Cong. Rec. S13156 (Aug. 3, 1976) (Sen. Curtis); 122 Cong. Rec. S13160 (Aug. 3, 1976) (Sen. Helms); 122 Cong. Rec. H8297 (Aug. 4, 1976) (Mr. Broyhill); 122 Cong. Rec. H8306 (Aug. 4, 1976) (Mr. Satterfield); 122 Cong. Rec. H9566 (Sept. 8, 1976) (Mr. Hagedorn). For arguments that such a standard was intended, see, *e.g.*, 122 Cong. Rec. S12480 (July 26, 1976) (Sen. Muskie); 122 Cong. Rec. S12781 (July 29, 1976) (Sen. Buckley); 122 Cong. Rec. H9562 (Sept. 8, 1976) (Mr. Preyer).

> "The concept of 'significant deterioration' is not contained in the present Clean Air Act. The significant deterioration regulations issued by EPA are based on court interpretation of the language 'protect and enhance.' The language cited in the Committee report to justify that interpretation is from the 1970 Senate report on clear air, not from the final Conference report on the 1970 amendments. It is inconceivable to me that the Congress would have made such a major change in existing law using the 'Findings and Purposes' Section of the Act and without providing any guidance or explanation in the body of the Act. The fact that the House-Senate Conference did not include the Senate report language would further support the argument that significant deterioration was not intended as a national policy." Sen. Rep. No. 94-717, 94th Cong., 2d Sess. 118 (1976).

In short, post-1970 efforts by certain members of Congress to deal with the no significant deterioration issue have not supplied, nor can they supply, a legislative intent on the subject not found in the 1970 Act. The court below was plainly in error for characterizing such efforts as "overwhelming evidence of legislative intent." 540 F.2d at 1127 (A. 61a).

C. If Congress Had Intended To Require EPA To Formulate A Regulatory Plan For The Prevention Of Significant Deterioration It Would Have Provided Standards For The Guidance Of The Agency In Its Rule-Making.

The EPA regulations on no significant deterioration have been issued pursuant to an order of the District Court for the District of Columbia in the 1972 case of *Sierra Club* v. *Ruckelshaus,* 344 F.Supp. 253 (D. D.C. 1972). While basing its order upon a policy of nondeterioration it purported to find in the purpose clause of the Clean Air Act, the District

Court was unable to point to any guideposts or standards within the statute that would help EPA formulate regulations on the subject. In upholding the regulations as issued, the Court of Appeals below likewise could point to no standards within the Act by which the regulations could be measured.

EPA has developed the regulations with no Congressional or judicial guidance whatsoever. The Agency had no notion from the very beginning as to what was to be considered "significant deterioration" and what was not. The dilemma the court's order posed for EPA was well expressed by the Administrator in announcing final promulgation of the regulations to the public, as follows:

> "Unfortunately, the judicial directive to EPA to prevent significant deterioration was little more specific than the Act itself. Accordingly, we have found ourselves in the difficult position of fashioning regulations that may have major impacts on the future of the Nation, without the reasonably detailed guidance that would have been desirable." Statement of EPA Administrator Russell E. Train, Nov. 27, 1974 on Final "Significant Deterioration" Regulations.

Mr. Train's expression of frustration echoed that of former Administrator Ruckelshaus, who, in testimony during the Clean Air Act Oversight Hearings in 1972, explained that he had not adopted a nondegradation policy for state implementation plans because, in his words, "I don't know what it means." Implementation of the Clean Air Act Amendments of 1970—Part 1, Hearings Before Subcommittee on Air and Water Pollution, Senate Committee on Public Works, 92d Cong., 2d Sess., at 272 (Feb. 18, 1972). As a result, EPA has been totally adrift in a sea of uncertainty, left to its own devices to fashion not just regulations but an actual policy of nondegradation.

The necessity for standards as guidelines for agency action has been stressed repeatedly by this Court. In *Yakus* v. *United States,* 321 U.S. 414 (1944), for example, Mr. Justice Stone said:

> "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. . . . *These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective.*" 321 U.S. at 424-25 (emphasis added).

The rule requiring standards in legislative delegations of authority to administrative agencies is a fixture of historical precedent (*e.g., Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935)), and it continues to have viability.[57] This Court recently cited such precedent as revered authority in holding that an FCC tax on cable television systems exceeded the authority granted to the agency by Congress. *National Cable Television Ass'n.* v. *United States,* 415 U.S. 336, 342 (1974). More recently, this Court observed:

> "[C]ongressional delegation of power to a regulatory entity must be accompanied by discernible standards,

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[57] In previous writing, Judge J. Skelly Wright, author of the opinion below, has agreed:

> "* * * I think the delegation doctrine retains an important potential as a check on the exercise of unbounded, standardless discretion by administrative agencies. At its core, the doctrine is based on the notion that agency action must occur within the context of a rule of law previously formulated by a legislative body. That concept is as important now as it was a century and a half ago when it was first propounded." Wright, Book Review, 81 Yale L.J. 575, 583-84 (1972).

> so that the delegatee's action can be measured for its fidelity to the legislative will." *City of Eastlake* v. *Forest City Enterprises*, 426 U.S. 668, 675 (1976).

The phrase—"protect and enhance"—is insufficient as a standard to guide EPA actions. The phrase serves at best to state a *purpose* for the Act, not a *standard* for administrative rule-making. The distinction between the stated purpose of a statute and a standard for purposes of agency delegation has been made clear by this Court as in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 574 (1939), where it said:

> "[E]ach enactment must be considered to determine whether it states the *purpose* which Congress seeks to accomplish *and the standards* by which that purpose is to be worked out with *sufficient* exactness to enable those affected to understand these limits." (Emphasis added.)[58]

Congress did this in the Clean Air Act. It stated its purpose was "to protect and enhance" the Nation's air quality and then in section after section detailed precisely how EPA was to develop, implement and enforce the primary, secondary and new source performance standards designed to "achieve and maintain" the desired levels of air quality. Totally absent from this comprehensive statutory scheme, however, is any mention of "no significant deterioration"

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[58] Similarly, in Yakus v. United States, 321 U.S. 414, 423 (1944), the Court upheld a delegation of authority under the Emergency Price Control Act, finding a statutory standard *in addition* to a purpose, as follows:

> "[T]he purposes of the Act specified in § 1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in § 2 define the boundaries within which prices having that purpose must be fixed."

or any requirement that EPA establish tertiary standards, as it now seeks to do.

That Congress would have evidenced such meticulous concern for standards to guide the Agency in the development of one set of rules but not for another, particularly where the latter will impact drastically upon the Nation's future growth and development of its natural resources,[89] is incomprehensible. In truth, no effort was made in the Clean Air Act to specify standards for the regulations here under review simply because Congress never intended that any regulations be promulgated for a non-existent "no significant deterioration" requirement in the Act.

II. The Clean Air Act Does Not Permit EPA To Adopt No Significant Deterioration Regulations Which Grant To Federal Land Managers And Indian Governing Bodies Power To Control Reclassification Of Lands.

EPA has granted exclusive control to federal land managers and Indian governing bodies as to the reclassification of lands within their jurisdiction for purposes of the increment classification limits under the no significant deterioration regulations. 40 C.F.R. §§ 52.21(c)(3)(ii) and (iii). Petitioners in Case No. 76-619 (*Utah Power & Light Co.* v. *EPA*) and Case No. 76-620 (*Western Energy Supply and Transmission Associates* v. *EPA*), which have been consolidated with this case, challenged such a grant of power as unauthorized under the Clean Air Act. The Petitioners herein hereby adopt the arguments of those Petitioners on this issue as presented in their petitions for a writ of certiorari and in their briefs on the merits. Petitioners also adopt the arguments on this issue in the Petitioners' brief on the merits in Case No. 76-529 (*Montana Power Co.* v. *EPA*).

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[89] See discussion page 7-11 *supra*.

CONCLUSION

For the foregoing reasons, Petitioners submit that EPA's no significant deterioration regulations are unlawful under the Clean Air Act, and respectfully request that the Court of Appeals for the District of Columbia Circuit be reversed and that the regulations be set aside.

Respectfully submitted,

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May 19, 1977

ADDENDUM

RELEVANT PROVISIONS OF THE CLEAN AIR ACT

42 U.S.C. § 1857

Findings And Purposes

Sec. 101 (a) The Congress finds

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

42 U.S.C. § 1857c-2

Air Quality Control Regions

Sec. 107. (a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality region in such State.

(b) For purposes of developing and carrying out implementation plans under section 110—

(1) an air quality control region designated under this section before the date of enactment of the Clean Air Amendments of 1970, or a region designated after such date under subsection (c), shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

(c) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, after consultation with appropriate State and local author-

ities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the governors of the affected States of any designation made under this subsection.

42 U.S.C. § 1857c-3

Air Quality Criteria And Control Techniques

Sec. 108. (a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an

air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) (1) Simultaneously with the issuance of criteria under subsection (a), the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the technology and costs of emission control. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1), which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such committee shall submit as appropriate, to the Administrator information related to that required by Paragraph (1).

(c) The Administrator shall from time to time review, and, as appropriate, modify and reissue any criteria or information on control techniques issued pursuant to this section.

(d) The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

42 U.S.C. § 1857c-4

National Ambient Air Quality Standards

Sec. 109. (a) (1) The Administrator—

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modification as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1) (B) of this subsection shall apply to to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

42 U.S.C. § 1857c-5

Implementation Plans

Sec. 110. (a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary

standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator

finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

[PL 93-319, June 24, 1974]

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority

to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notificaion by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2) (A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking

surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Admininstrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1. 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a

permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

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(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

(e) (1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving

sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f) (1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class)for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirements before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other

alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interrim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare, then the Administrator shall grant a postponement of such requirement.

(2) (A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearings, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States Court of Appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in Section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm, or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 307(a) (relating to subpoenas) shall be applicable to any proceeding under this subsection.

42 U.S.C. § 1857c-6

Standards Of Performance For New Stationary Sources

Sec. 111. (a) For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who

owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(b) (1) (A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purposes of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories

of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards (except with respect to new sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)(1)(A) but (ii) to which a standard of performance under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan.

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

42 U.S.C. § 1857d-1

Retention Of State Authority

Sec. 116. Except as otherwise provided in sections 119(c), (e) and (f), 209.211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

[PL 93-319, June 24, 1974]

42 U.S.C. § 1857h-5(b)(1)

General Provision Relating To Administrative Proceedings And Judicial Review

Sec. 307

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary

ambient air quality standard, any emission standard under section 112, any standard of performance under section 111; any standard under section 202 (other than a standard required to be prescribed under section 202 (b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.

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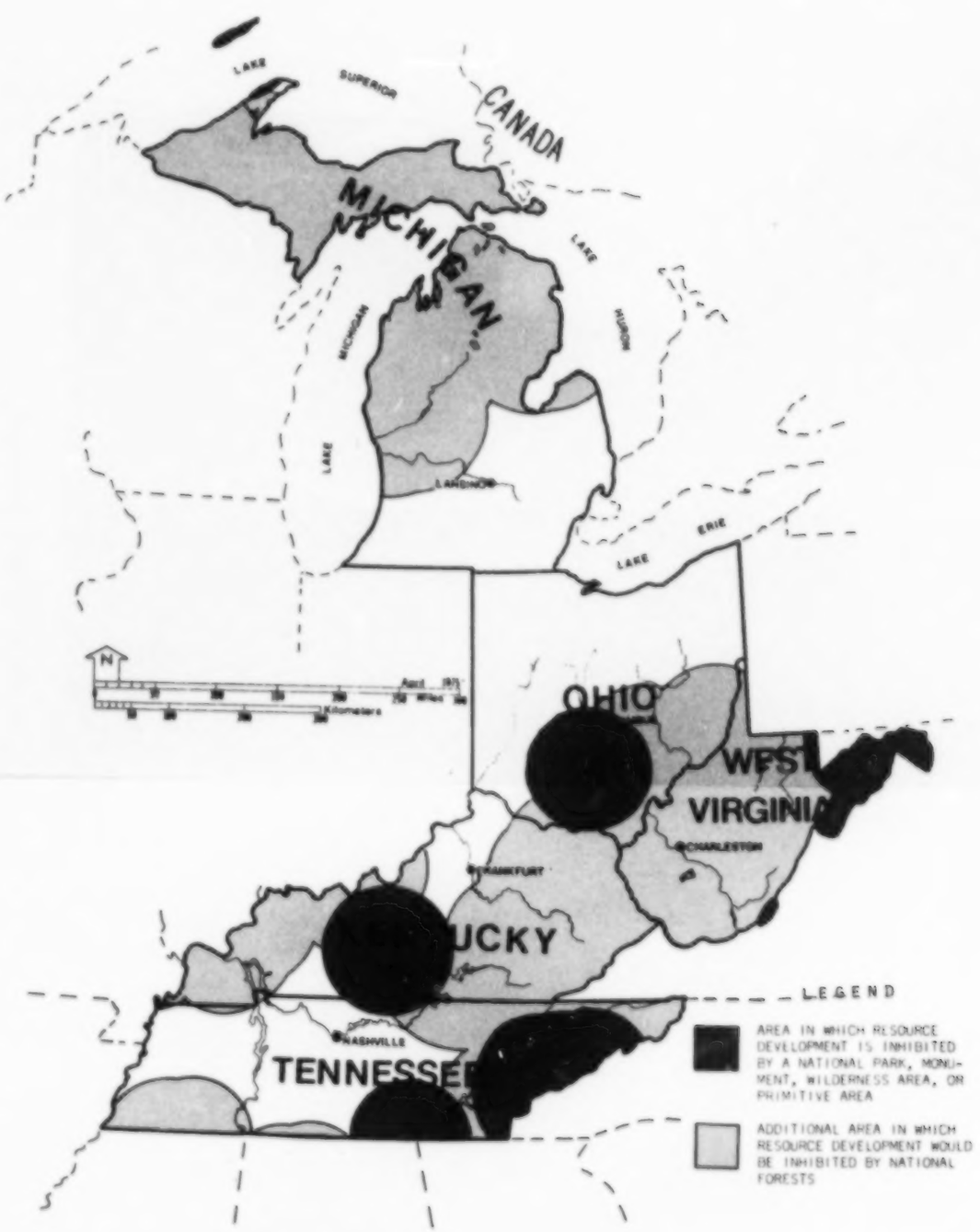
(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.



INHIBITION ZONES CAST BY FEDERALLY
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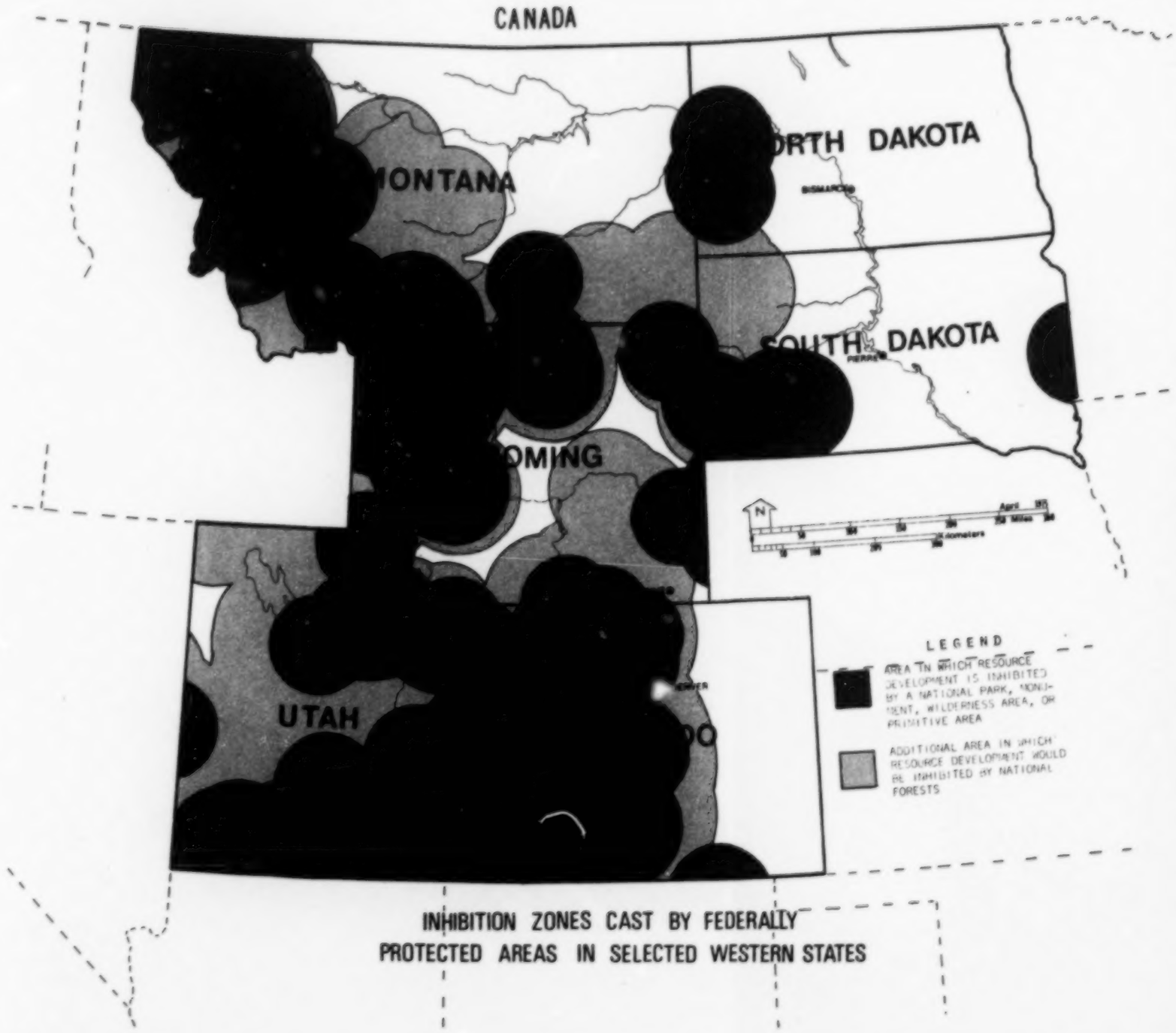

INHIBITION ZONES CAST BY FEDERALLY PROTECTED AREAS IN SELECTED WESTERN STATES